85-1753

Supreme Court, U.S.
FILED
APR 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In the

Supreme Court of the United States

OCTOBER TERM, 1985

DARRELL UNRUH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF COLORADO

JEFFREY A. SPRINGER, P.C.

Jeffrey A. Springer
1600 Broadway, Suite 1500
Denver, Colorado 80202
(303) 861-2800

Counsel for Petitioner

April 1986.

QUESTIONS PRESENTED FOR REVIEW

I. Was the decision below rendered in contravention of the Petitioner's rights under the Fourth Amendment to the United States Constitution. Specifically, did the Petitioner have a legitimate expectation of privacy in both his safe and its contents which was violated when, on grounds not sufficient to constitute probable cause, the safe was subjected to a warrantless dog sniff.

II. Whether the decision of the Supreme Court of Colorado conflicts with this Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968), as well as subsequent decisions interpreting *Terry*.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii, iii
QUESTIONS PRESENTED FOR REVIEW	1
THE PARTIES	1
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	
I. THE DECISION BELOW IS IN CONTRAVENTION OF THE PETITIONER'S RIGHTS UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION. SPECIFICALLY, THE PETITIONER HAD A LEGITIMATE EXPECTATION OF PRIVACY IN BOTH HIS SAFE AND ITS CONTENTS WHICH WAS VIOLATED WHEN, ON GROUNDS NOT SUFFICIENT TO CONSTITUTE PROBABLE CAUSE, THE SAFE WAS SUBJECTED TO A WARRANTLESS DOG SNIFF.	5
II. THE DECISION OF THE SUPREME COURT OF COLORADO CONFLICTS WITH THIS COURT'S DECISION IN *TERRY V. OHIO*, 392 U.S. 1 (1968) AS WELL AS SUBSEQUENT DECISIONS INTERPRETING *TERRY*.	9
CONCLUSION	13

APPENDIX:

Opinion of the Supreme Court of the State of Colorado APP. A

Trial Court's Ruling on Defendant's Motion to Suppress APP. B

Order of the Supreme Court of the State of Colorado Denying Petitioner's Petition for Rehearing APP. C

Petitioner's Petition for Rehearing Filed in the Supreme Court of the State of Colorado APP. D

Defendant's Motion to Suppress Filed in the District Court, City and County of Denver, Colorado APP. E

TABLE OF AUTHORITIES

CASES:	Page
Chimel v. California, 395 U.S. 252 (1969)	*6, 11*
Katz v. United States, 389 U.S. 347 (1967)	*7*
Michigan v. Long, 463 U.S. 1032 (1983)	*5*
New York v. Class, ____U.S.____, 54 U.S.L.W. 4178 (U.S. Feb. 25, 1986)	*5, 6, 7, 11*
People v. Unruh, No. 84SA299 (Colo. Jan. 21, 1986)	*6, 8, 10, 11, 12*
Rakas v. Illinois, 439 U.S. 128 (1978)	*7*
Terry v. Ohio, 392 U.S. 1 (1968)	*1, 6, 9, 10, 11, 13, 14*
United States v. Jacobsen, 52 U.S.L.W. 4414 (U.S. April 2, 1984)	*7, 12*
United States v. Karo, 468 U.S.____, 52 U.S.L.W. 5102 (July 3, 1984)	*6, 9, 12, 13*
United States v. Place, 462 U.S. 696 (1983)	*6, 8, 11, 12*
United States v. Ross, 456 U.S. 798 (1982)	*8*
United States v. Ventresca, 380 U.S. 102 (1965)	*6*
Walter v. United States, 447 U.S. 649 (1980)	*8*

TABLE OF AUTHORITIES
(Continued)

STATUTES:

	Page
U.S. Constitution, Amendment IV	3
28 U.S.C. §1257(3)	2
28 U.S.C. §2101(d)	2
Supreme Court Rule 20, 28 U.S.C.	2
Section 13-4-110(1)(a), 6 C.R.S. (1973)	2
Section 18-18-105, 8 C.R.S. (1985 Supp.)	3
Section 18-18-106, 8 C.R.S. (1985 Supp.)	3

In the

Supreme Court of the United States

OCTOBER TERM, 1985

DARRELL UNRUH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

The Petitioner, DARRELL UNRUH, prays that a Writ of Certiorari issue to review the judgment and opinion of the Colorado Supreme Court which became final on February 25, 1986.

QUESTIONS PRESENTED FOR REVIEW

I. Was the decision below rendered in contravention of the Petitioner's rights under the Fourth Amendment to the United States Constitution. Specifically, did the Petitioner have a legitimate expectation of privacy in both his safe and its contents which was violated when, on grounds not sufficient to constitute probable cause, the safe was subjected to a warrantless dog sniff.

II. Whether the decision of the Supreme Court of Colorado conflicts with this Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968), as well as subsequent decisions interpreting *Terry*.

THE PARTIES

The Parties to the judgment sought to be reviewed in this action are those named in the caption of the case.

OPINIONS BELOW

District Court for the City and County of Denver, State of Colorado: Pertinent excerpts of the transcript of the suppres-

sion hearing held in the District Court for the City and County of Denver, State of Colorado, denying the Petitioner's Motion to Suppress evidence obtained as a result of the search of his safe appear in Appendix B of this Petition.

Colorado Court of Appeals: Following his conviction in the Trial Court, Petitioner filed his notice of appeal on November 19, 1982. Because one of the issues on appeal was the constitutionality of a Colorado statute, the Respondent filed a motion to transfer the action to the Supreme Court of the State of Colorado. In response to the motion, the Colorado Court of Appeals referred the case to the Supreme Court pursuant to Section 13-4-110 (1)(a), 6 C.R.S. (1973). By Order dated June 27, 1984 the Colorado Supreme Court accepted jurisdiction of the matter. Therefore, there is no opinion of the Colorado Court of Appeals.

Colorado Supreme Court: The opinion of the Colorado Supreme Court affirming the Petitioner's conviction appears in Appendix A of this Petition.

JURISDICTION

The opinion and judgment of the Colorado Supreme Court was entered on January 21, 1986. Petitions for rehearing, filed on behalf of both the Petitioner and the Respondent, were denied on February 25, 1986. The Order denying the Petitions for Rehearing appears in Appendix C of this Petition. This Petition for Certiorari was timely filed within sixty days from the date of the denial of the Petitions for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), 28 U.S.C. §2101(d) and Supreme Court Rule 20, 28 U.S.C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV to the Constitution of the United States provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and

the person or things to be seized.

There are no statutory provisions involved.

STATEMENT OF THE CASE

This was an action brought by the People of the State of Colorado in the District Court, City and County of Denver, Colorado, charging the Petitioner, Darrell Unruh, with possession of cocaine, in violation of Section 18-18-105, 8 C.R.S. (1985 Supp.) and possession of marijuana, in violation of 18-18-106, 8 C.R.S. (1985 Supp.)

On September 29, 1981, at approximately 2:30 p.m., Detective Robert Turner of the Denver Police Department observed three individuals attempting to cover a large object in the trunk of a car. When he returned for a closer inspection, Detective Turner found the car abandoned with a safe visible in the trunk. By radio Turner contacted the Denver Police Department with a description of the individuals he had seen attempting to conceal the safe. Shortly thereafter a suspect was apprehended. The suspect, Bradley Sare, informed Turner that he, Sare, had participated with two others in the burglary of a residence in the vicinity of Second Avenue and Colorado Boulevard in Denver, Colorado. The location described by Sare is approximately fourteen blocks from where Turner initially observed the safe in the car. Sare also told Turner that he, Sare, and the other individuals took the safe because they thought it might possibly contain money or drugs.

Denver Police began a search in the vicinity of Second Avenue and Colorado Boulevard in an attempt to locate the residence Sare claimed to have burglarized. In that neighborhood, a Detective located a house which appeared to have been burglarized. The front door of the house was open and the doorjamb was splintered. Upon his arrival at the scene, Detective Turner entered the residence to determine whether other participants in the crime or any victims might be in the house. Inside the house Turner noticed a checkbook and several pieces of mail bearing the names of the Petitioner and his wife. After attempting to locate the Petitioner through the bank name on the checkbook, Turner conducted a search of the house. Turner entered the lower level of the house and saw marks on the floor which indicated the location from where the safe had

been removed. After police lab technicians arrived, Turner observed, in the room from which the safe had been taken, a mirror, spoon and playing card with white residue on them. However, Turner attached no significance to these items.

The Petitioner, Darrell Unruh, arrived at his house approximately thirty minutes after Detective Turner originally entered. Unruh advised Turner that a safe had been stolen. Unruh inquired of Turner if he, Unruh, could get the safe back. Turner informed Unruh he could probably get the safe back in a day or so. The safe was taken to the Police Department.

According to Turner, the morning following the burglary he began to wonder if the safe contained drugs. Turner testified this "wonderment" was prompted by Sare's statement, the playing card, spoon and residue, and the fact the name "Unruh" rang a bell. Turner contacted a detective in the Denver Police Department Vice Bureau who located a "card" indicating the Petitioner was a "suspected drug dealer". The date of the information on this card was September 24, 1979. The address on the card was not the address at which the Petitioner lived. Based upon the above, the safe was subjected to a dog sniff. On the basis of the dog's reaction, a search warrant was issued for the contents of the safe. The safe was opened by Denver Police Department officials and Fire Department personnel. Inside the safe were found marijuana, cocaine, stock certificates, papers, and approximately $27,000 in cash.

As a result of evidence seized from the safe, a four-count criminal Complaint/Information was filed in Denver County Court charging the Petitioner and his wife with possession of cocaine, sale of cocaine, dispensing cocaine, and possession of more than one ounce of marijuana. After a Preliminary Hearing, the possession of cocaine and possession of marijuana counts were bound over to the Denver District Court.

Prior to the trial in this action, the Petitioner filed a Motion to Suppress alleging, *inter alia*, violations of his rights under the Fourth Amendment to the United States Constitution. A copy of the Motion to Suppress appears in Appendix E of this Petition. Commencing Friday, May 21, 1982 and concluding Monday, May 24, 1982, a suppression hearing was held on the Petitioner's Motion to Suppress. At the conclusion of the evidence and arguments on each side, the Trial Court ruled from the bench, on the record, in favor of the People. The Trial Court's

ruling, taken from the transcript of the suppression hearing, appears in Appendix B of this Petition.

On August 9, 1982, the Petitioner's jury trial on charges of possession of cocaine and possession of marijuana began. At that trial, the evidence which was the subject of the suppression hearing was admitted in the prosecution's case-in-chief. On August 13, 1982 guilty verdicts were returned against the Petitioner. On August 24, 1982, the Petitioner filed his Motion for New Trial. The Motion for New Trial was denied on November 5, 1982, and the Petitioner was sentenced to five years in the custody of the Colorado Department of Corrections.

The Petitioner appealed his conviction to the Colorado Court of Appeals. However, prior to any ruling by that court, the Colorado Supreme Court accepted jurisdiction in this action. By Opinion dated January 21, 1986, a copy of which appears as Appendix A of this Petition, the Supreme Court of the State of Colorado affirmed the judgment of the Trial Court. Both the People of the State of Colorado and the Petitioner subsequently timely filed Petitions for Rehearing. A copy of Darrell Unruh's Petition for Rehearing appears as Appendix D of this Petition. On February 25, 1986 the Supreme Court of Colorado entered its Order denying the Petitions for Rehearing. Justice Lohr indicated he would have granted Unruh's Petition for Rehearing. A copy of the February 25, 1986 Order of the Supreme Court of Colorado denying both Petitions for Rehearing appears as Appendix C of this Petition.

Although the Colorado Supreme Court indicated it was adopting the minority view regarding dog sniffs, the Opinion applies both state and federal case law. The Opinion does not contain the requisite "plain statement" that it rests on state grounds. *New York v. Class*, _____U.S._____,54 U.S.L.W. 4178 (U.S. Feb. 25, 1986); *Michigan v. Long*, 463 U.S. 1032 (1983).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN CONTRAVENTION OF THE PETITIONER'S RIGHTS UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION. SPECIFICALLY, THE PETITIONER HAD A LEGITIMATE EXPECTATION OF PRIVACY IN BOTH HIS SAFE AND ITS CONTENTS WHICH WAS VIOLATED WHEN, ON GROUNDS NOT SUFFICIENT TO CON-

STITUTE PROBABLE CAUSE, THE SAFE WAS SUBJECTED TO A WARRANTLESS DOG SNIFF.

In its decision, the Colorado Supreme Court found, *inter alia:* (1) the possession by the Denver Police Department of the Petitioner's safe was not a seizure within the constitutional proscription against seizures absent probable cause or, in the alternative, any seizure which occurred was lawful; (2) the Petitioner had a reasonable expectation of privacy in his safe; (3) the dog sniff of the Petitioner's safe was a "search" within constitutional proscriptions against searches without probable cause; and, (4) the search which occurred in this action fell within the exception enunciated in *Terry v. Ohio,* 392 U.S.1 (1968), and therefore did not require probable cause. *People v. Unruh,* No. 84SA299, slip op. at 5, 6, 10, 11 (Colo. Jan. 21, 1986), Appendix A. The findings of the Colorado Supreme Court regarding the Petitioner's reasonable expectation of privacy in the safe and the fact the dog sniff constituted a search affirmed the findings made by the Trial Court at the conclusion of the suppression hearing. *People v. Unruh,* No. 82CR0025, Reporter's Transcript filed Dec. 21, 1982, p.2, Appendix B. The Colorado Supreme Court correctly found that, under the circumstances presented in this case, the dog sniff of the safe constituted a search within the meaning of the Fourth Amendment. Although this Court has had opportunity to address the constitutional implications of dog sniffs occuring in airports, the facts of this action present this Court with a compelling factual framework within which to determine whether, absent the existence of a warrant or probable cause, dog sniffs may be conducted under non-exigent circumstances in which a person has no diminished expectation of privacy in the article searched or its contents.

As a general rule, searches must be conducted pursuant to a warrant backed by probable cause. *United States v. Ventresca,* 380 U.S. 102 (1965); *New York v. Class,* _____U.S._____, 54 U.S.L.W. 4178 (U.S. Feb. 25, 1986). In addition, warrantless searches are *per se* unreasonable absent the existence of some exigent circumstance which prevents obtaining a warrant. *See, e.g., Chimel v. California,* 395 U.S. 752 (1969); *United States v. Place,* 462 U.S. 696 (1983); *United States v. Karo,* 468 U.S._____, 52 U.S.L.W. 5102 (U.S. July 3, 1984). Because the search conducted in this action was not conducted pursuant to a

search warrant and was not supported by probable cause, the evidence seized as a result of the search should have been suppressed at the Petitioner's trial.

Inquiry into whether a govenmental investigative technique constitutes a search within the constitutional prohibition against unreasonable searches and seizures begins with *Katz v. United States*, 389 U.S. 347 (1967). To determine whether governmental action constitutes a search within the meaning of the Constitution, a court must ascertain whether the action intruded upon a legitimate expectation of privacy. *Katz v. United States, supra.* In order to determine whether an individual has a legitimate expectation of privacy, a court must find: (1) the individual had a subjective expectation of privacy, and, (2) the expectation is one society is prepared to recognize as legitimate. *New York v. Class*, _____U.S._____,_____,54 U.S.L.W. 4178, 4179 (U.S. Feb. 25, 1986) (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J. concurring)). If both these inquiries are answered in the affirmative, then any governmental intrusion upon that privacy is a search. The inquiry then focuses on whether the search took place pursuant to a warrant or, in the absence of a warrant, whether the search fits within one of this Court's narrowly prescribed exceptions to the warrant requirement.

No one can seriously dispute that Darrell Unruh, by keeping a locked safe in a closet in a locked, private residence has manifested a subjective expectation of privacy in the contents of his safe. With regard to the second criteria, obviously, expectations of privacy which are legitimate cannot depend primarily on cases deciding exclusionary rule issues in criminal cases. "Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society". *United States v. Jacobsen*, _____ *U.S.*_____,52 U.S.L.W. 4414, 4417 (U.S. April 2, 1984) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143-144, n.12 (1978)). Whether this Court chooses to analyze Unruh's expectation of privacy by reference to concepts of real or personal property law, or to understandings recognized and permitted by society, Unruh's expectations are clearly legitimate.

In this action, Darrell Unruh undertook no act which in any way could be construed as diminishing his expectation of

privacy in his safe and its contents. The residence itself was also locked. The Petitioner did not place his safe in an area accessible to the public. Even had Unruh placed his safe in an area accessible to the public, this Court has recognized a container may support a reasonable expectation of privacy. *See, e.g., United States v. Place, supra; United States v. Ross*, 456 U.S. 798 (1982). Nor can the actions of the thieves, in removing Unruh's safe from his residence and placing it in an area accessible to the public, diminish the Petitioner's legitimate expectation of privacy in the contents of the safe. *Walter v. United States*, 447 U.S. 649 (1980).

Both the Denver District Court and the Colorado Supreme Court expressly found Darrell Unruh retained a legitimate expectation of privacy in his safe. *People v. Unruh, supra* at 10, Appendix A; *People v. Unruh*, Reporter's Transcript, p. 2, Appendix B. In addition, neither Court found any diminution of that expectation of privacy. These findings are not inconsistent with decisions of this Court which have sanctioned dog sniffs in other circumstances. *See, e.g., United States v. Place*, 462 U.S. 696 (1983). In its Opinion in this action, the Supreme Court of Colorado explicitly declined to consider whether a dog sniff conducted in an airport constituted a search. The Supreme Court in this action expressly noted "the facts of the case before us do not lend themselves to the same mode of resolution..." because the Supreme Court found Unruh had a reasonable expectation of privacy in his safe. *People v. Unruh, supra* at 10, Appendix A.

When the safe was being kept in the basement of Unruh's house, there is no doubt Unruh's expectation of privacy as to its contents was legitimate. Likewise, as noted above, Unruh's legitimate expectation of privacy in the contents of the safe was not waived or diminished by the acts of those stealing the safe. *Walter v. United States*, 447 U.S. 649 (1980). Unruh remained the rightful owner of the safe and the safe remained locked. After the theft of the safe, Unruh returned to his house, told Turner the safe had been stolen, and asked when he, Unruh, could get the safe back. In short, the police were in possession of a locked container whose rightful owner was known to them. The police were also aware the owner was interested in obtaining the return of his property. The contents of the safe were unknown to the police. They had no probable cause to believe

the fruits or instrumentalities of a crime were held inside the safe. Yet, fully aware of the identity of the owner of the safe, that the safe was going nowhere, that the safe was locked, and that they lacked any legally sufficient reason to search the safe, the police subjected the safe to a dog sniff. Under these circumstances, the actions of the police clearly constitute a governmental intrusion into an expectation of privacy held by the Petitioner which society is willing to recognize as legitimate.

Like the electronic beeper involved in *United States v. Karo*, 468 U.S. _____, 52 U.S.L.W. 5102 (U.S. July 3, 1984), the dog sniff was somewhat less intrusive than a full-scale search. And, like the beeper in *United States v. Karo, supra,* the dog sniff revealed a critical fact about the interior of the safe which the police were interested in knowing and could not have otherwise obtained without a warrant. The Petitioner clearly had a subjective expectation of privacy in the contents of his safe. Society is prepared to recognize as legitimate an expectation of privacy in the contents of a locked safe kept in the basement of one's house. The acts of the thieves in this action did not, and could not, remove or diminish that expectation of privacy. Under the facts and circumstances of this case, the dog sniff was a search. There is no dispute this search was conducted without a warrant and without probable cause. Therefore, the search involved in this action was conducted in contravention of the Petitioner's rights under the Fourth Amendment to the United States Constitution, and all evidence derived from that search should have been suppressed at the Petitioner's trial.

II. THE DECISION OF THE SUPREME COURT OF COLORADO CONFLICTS WITH THIS COURT'S DECISION IN *TERRY V. OHIO*, 392 U.S. 1 (1968) AS WELL AS SUBSEQUENT DECISIONS INTERPRETING *TERRY*.

Both the Colorado Supreme Court and the Denver District Court recognized the legitimacy of the Petitioner's expectation of privacy in his safe. The Colorado Supreme Court also correctly held, under the circumstances of this case, the dog sniff was a search. However, after recognizing the dog sniff was a search, the Colorado Supreme Court erred in finding the search could, under the principles enunciated in *Terry v. Ohio, supra,* be conducted without a warrant and without probable cause. The

Petitioner respectfully submits this finding does not comport with the requirements of the Fourth Amendment to the United States Constitution, and is contrary to this Court's decision in *Terry v. Ohio,* 392 U.S. 1 (1968), as well as subsequent cases which interpret *Terry.*

Having determined the dog sniff at issue here was a search, the Colorado Supreme Court stated the next step in the analysis was to determine, "considering all the circumstances of the search, whether the warrantless search was unreasonable". *People v. Unruh, supra* at 10, Appendix A. The application of this methodology is clearly erroneous. No court has ever adopted "reasonableness" as the sole criterion to determine the constitutionality of a warrantless search. The decisions of this Court in which the reasonableness of a warrantless search has been at issue have required, as a predicate to engaging in any analysis as to whether the search is reasonable, a finding of some exigent circumstance, as well as a diminution in any legitimate expectation of privacy, to uphold the search. In addition, the search must be strictly limited by the exigencies which justify its initiation. Of the carefully circumscribed exceptions to the warrant requirement, only the exception announced in *Terry v. Ohio, supra,* permits a search on less than probable cause. The principles enunciated in *Terry* were the basis for the Colorado Supreme Court's holding that the dog sniff here did not amount to an unconstitutional search. The holding of the Colorado Supreme Court, which dispenses with the warrant requirement for non-exigent, non-human sense searches is directly contrary to all precedent of this Court, including *Terry v. Ohio, supra,* and is patently unconstitutional.

The Colorado Supreme Court recognized the Petitioner's legitimate expectation of privacy in his safe and held, under the circumstances of this case, the dog sniff was a search. However, in determining this non-exigent, non-human sense search does not demand probable cause nor prior judicial approval, the Colorado Supreme Court misapplied and misapprehended the principles enunciated in *Terry v. Ohio,* as well as the scope of constitutional protections against warrantless searches. By its holding, the Colorado Supreme Court has wholly emasculated the constitutionally mandated privacy protections for "high-tech" or non-human sense searches. In essence, the holding

states the protections afforded by the Fourth Amendment to the United States Constitution are to be measured by the reasonableness of a police officer's conduct rather than the existence of probable cause to search. Prior to this holding, the reasonableness of a search, standing alone, has never been sufficient to circumvent the warrant requirement.

The Colorado Supreme Court's finding the search involved here was "reasonable" begs the question. Under this Court's precedents, warrantless searches are *per se* unreasonable absent the existence of some exigent circumstance, as well as a diminution of the expectation of privacy in the article or place searched. *See, e.g., Terry v. Ohio,* 392 U.S.1 (1968); *Chimel v. California,* 395 U.S. 752 (1969); *United States v. Place,* 462 U.S. 696 (1983); *New York v. Class,* _____U.S._____, 54 U.S.L.W. 4178 (U.S. Feb. 25, 1986). The fatal flaw in the line of reasoning adopted by the Colorado Supreme Court is apparent. Under the circumstance of this case, there existed neither an exigent circumstances nor any diminution in Unruh's expectation of privacy in the contents of the safe which would justify a search without a warrant, let alone a search on less than probable cause.

No court has ever stretched a *Terry* analysis as far as the Colorado Supreme Court has in this action. Unlike the unusually dangerous, spur-of-the-moment confrontation involved in *Terry,* or the non-government controlled channeling of a suitcase through a public airport in *Place,* the safe in this case was securely in the custody and control of the Denver Police Department. The Colorado Supreme Court expressly found this custody and control of the safe by the Police Department was lawful. *People v. Unruh, supra* at 6, Appendix A. The law enforcement officers involved here had ample opportunity to apply for a search warrant. They held the safe for nearly 24 hours prior to subjecting it to a dog sniff. To justify a warrantless search under these circumstances upon a *Terry* analysis ignores the condition precedent to engaging in the *Terry* analysis — the finding of exigent or highly unusual circumstances which do not allow further investigation. Any *Terry* search must be strictly circumscribed by the exigencies which justify its initiation. *Terry v. Ohio, supra* at 25-26. There were no such exigent circumstances to justify initiation of the search undertaken here.

The police were lawfully in possession of the safe. Under the holding of the Colorado Supreme Court in this case, the police could have lawfully retained the safe for an indefinite period of time absent a direct demand by the Petitioner for the return of the safe. The Supreme Court expressly found the Petitioner made no such demand. *People v. Unruh, supra* at 5, Appendix A. To allow the search conducted in this action to stand would indeed be a substantial step toward the packs of roving "canine cocaine connoisseurs" envisioned by Justice Brennan in his dissent in *United States v. Jacobsen,* 52 U.S.L.W. 4414, 4422 (1984).

In *United States v. Place, supra,* this Court stopped short of holding a canine sniff *per se* was not a search. Instead, the Court stated, on the particular facts of *Place*, a dog sniff of luggage, intentionally placed in the public domain of an airport by its owner, was not a search. The facts of *Place* involved exigent circumstances warranting a brief detention of the luggage. In addition, the Court noted the search must be related to the reason for the initial seizure. The Court did not even suggest that a warrantless sniff of luggage *not* voluntarily exposed to the public would be exempt from the Fourth Amendment protections, including the warrant requirement. Instead, the United States Supreme Court has suggested the result under that circumstance would likely be to the contrary.

In *United States v. Karo,* 468 U.S._____, 52 U.S.L.W. 5102 (U.S. July 3, 1984), the Court flatly rejected the notion that, simply by utilizing a non-intrusive means (an electronic beeper) of determining only the presence of ether in an area not open or exposed to the public, law enforcement officers could avoid the warrant requirement. The Court's analysis in *Karo* is equally applicable to a dog sniff of a safe never intentionally exposed to the public:

> "The monitoring of an electronic device such as a beeper is, of course, less intrusive than a full-scale search, but it does reveal a critical fact about the interior of the premises that the government is extremely interested in knowing and that it could not have otherwise obtained without a warrant...The government's contention that warrantless beeper searches should be deemed reasonable is based upon its deprecation of the benefits and exaggeration of the

> difficulties associated with procurement of a warrant...Those suspected of drug offenses are no less entitled to that protection than those suspected of non-drug offenses." *United States v. Karo*, 468 U.S. at _____,_____,_____, 52 U.S.L.W. at 5104, 5105 (U.S. July 3, 1984).

In this case, the dog sniff was no less intrusive than the beeper in *Karo*. Each disclosed *only* the presence of a particular item within the confines of an otherwise wholly private enclosure. Similarly the need to investigate and capture drug offenders is no greater here than in *Karo*. Yet, in *Karo*, even the additional fact that the drum of ether was to be placed beyond the control of the government agents — in contradistinction to the continued control of the safe by law enforcement officers in this case — was not sufficient to circumvent the warrant requirement. Absent exigent circumstances, *Karo* clearly precludes application of a general reasonableness standard as a basis for avoiding the constitutional requirement that a warrant be obtained, even for what otherwise might be a limited, specific search which could only reveal the presence of illicit drugs.

By abolishing the warrant requirement for this search, the Colorado Supreme Court has charted a course which will be explored zealously by law enforcement officers without benefit of advance judicial approval. A non-exigent view into one's home with a device designed exclusively to detect the presence of contraband is now countenanced by this case, and will occur without any prior judicial scrutiny. Simply stated, as long as police officers do not rely upon their own senses, they may search at will based upon their "reasonable suspicions". Searches conducted upon nothing more than the "reasonable suspicions" of police officers were precisely what the framers of the Constitution intended to preclude by addition of the Fourth Amendment to the Constitution. Neither *Terry* nor any other precedent of this Court allows for this wholesale abandonment of the warrant requirement and protections afforded by the United States Constitution.

CONCLUSION

The decisions of the United States Supreme Court have, with a few narrowly circumscribed exceptions, required a warrant

based upon probable cause prior to searching any article or place. Of this Court's exceptions to the warrant requirement, only the exception announced in *Terry v. Ohio*, 392 U.S. 1 (1968), has permitted a warrantless search on less than probable cause. The decisions of this Honorable Court which have applied *Terry* principles to other situations are virtually identical in two respects. First, those decisions all involve circumstances which demanded an immediate response from police officers. Second, those cases all involved circumstances under which there existed a diminished expectation of privacy in the person or thing searched. Neither of those considerations is present under the facts of this case. The dog sniff involved in this case was clearly a search.

Evidence of the contents of the safe was admitted at the Petitioner's trial in violation of his rights under the Fourth Amendment to the United States Constitution. In addition, the Colorado Supreme Court clearly erred in applying the principles enunciated in *Terry v. Ohio, supra,* to the facts and circumstances of this case. The Petitioner submits the above-stated reasons constitute sufficient grounds for a grant of Writ of Certiorari by this Honorable Court.

For the above-stated reasons, the Petitioner respectfully requests this Honorable Court grant a Writ of Certiorari in this action.

Respectfully submitted,
JEFFREY A. SPRINGER, P.C.

Jeffrey A. Springer
1600 Broadway, Suite 1500
Denver, CO 80202
Telephone: (303) 861-2800

Counsel for Petitioner

APPENDIX A

SUPREME COURT, STATE OF COLORADO
No. 84SA299 January 21, 1986

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellee,

vs.

DARRELL UNRUH,
Defendant-Appellant.

Appeal from District Court, City and County of Denver
Honorable Raymond D. Jones, District Judge
EN BANC JUDGMENT AFFIRMED

Duane Woodard, Attorney General
Charles B. Howe, Deputy Attorney General
Richard H. Forman, Solicitor General
Eric B. Perryman, Assistant Attorney General
Denver, Colorado
Attorneys for Plaintiff-Appellee

Jeffrey A. Springer, P.C.
Jeffrey A. Springer
Robert M. Brown
Denver, Colorado
Attorneys for Defendant-Appellant

JUSTICE DUBOFSKY delivered the Opinion of the Court.

JUSTICE ROVIRA specially concurs and JUSTICE ERICKSON joins the special concurrence.

Darrell Unruh, the defendant, was convicted in Denver District Court after a jury trial of possession of cocaine under sections 18-18-105, 8 C.R.S. (1985 Supp.), and 12-22-310, 5 C.R.S. (1985), and possession of more than one ounce of marijuana under section 18-18-106, 8 C.R.S. (1985 Supp.). The defendant challenges his conviction on the grounds that section 18-18-105 denies him equal protection of the laws[1] and that his conviction was based on evidence that the district court should have suppressed because it was obtained in violation of the fourth amendment to the United States Constitution and article II, section 7, of the Colorado Constitution. The evidence that the defendant challenges is the cocaine and marijuana discovered in his safe after a trained police dog sniffed and reacted positively to the safe. We affirm the judgment of the district court.

On September 29, 1981, Detective Robert Turner of the Denver Police Department observed three individuals attempting to cover a large, apparently heavy object in the trunk of a car. Detective Turner drove past the car then returned for another look. He found the car abandoned with a safe visible in the trunk. Detective Turner radioed a description of the individuals he had seen trying to conceal the safe and shortly thereafter police officers apprehended a suspect. The suspect told Turner that he had participated with two others in the burglary of a residence in the vicinity of Second Avenue and Colorado Boulevard. According to Detective Turner, the suspect also told him that he thought the safe contained money and drugs.

Another detective located a house that appeared to have been broken into in the neighborhood described by the suspect to Detective Turner. The front door of the house was open and the door jamb was splintered. Detective Turner arrived, shouted "police" into the residence, and then entered. Inside the house Detective Turner noticed on a table a checkbook and several pieces of mail bearing the names of the defendant and his wife. Turner contacted the bank indicated on the checkbook in an attempt to locate the defendant. He then conducted a search of the premises. On the lower floor of the house Turner noticed marks in a small room or closet indicating where the safe had been located. In the same closet, he observed a triple-beam

scale, a mirror, two teaspoons, and a playing card, all bearing a white residue.

Shortly after the discovery of these items, the defendant returned home. He confirmed the fact that his safe had been stolen, and Detective Turner informed him that the safe had been recovered and taken to police headquarters for safekeeping. The defendant asked Detective Turner when he might expect the release of the safe and was told "probably the following day or so."

Detective Turner suspected that the safe contained drugs because of the burglary suspect's statements, the scale, spoons, playing card, and mirror found in the room where the safe had been located, and the fact that the defendant's name sounded familiar. Turner contacted a detective in the Denver Police Department vice bureau who produced from his files a card on a Darrell Norman Unruh. The card listed Unruh's address as 2050 South Columbine and indicated, in an entry dated September 24, 1979, that Darrell Norman Unruh was a suspected cocaine dealer.

The detectives decided to submit the safe to a sniff by a narcotics detection dog. According to Detective Turner, when the dog was brought into the room at the police department where the safe was being kept, the dog "immediately responded to the safe and pawed at it. The dog was then taken from the room and brought back and he immediately went to the same safe again." In an affidavit seeking a warrant to open the safe, Detective Turner recited the bases of his suspicions concerning the contents of the safe and the results of the dog sniff. After obtaining the warrant, the police officers had the safe pried open with hydraulic tools. Inside, they discovered, among other things, 126 grams of cocaine and 1.2 kilograms of marijuana. The defendant moved to suppress the contents of the safe. The district court denied the motion, and the defendant was convicted of possession of cocaine and marijuana.

I.

The defendant contends that his conviction of a felony under section 18-18-105, violated his right to equal protection of the laws[2] because section 12-22-314 (1)(m), 5 C.R.S. (1985 Supp.), punishes possession of cocaine obtained from an unlawful source by a "practitioner" as a misdemeanor. The term "practitioner" is defined by section 12-22-102(16), 5 C.R.S. (1985) as

"a person authorized by law to prescribe any drug, medicine, or poison, acting within the scope of such authorization."

In resolving doubts concerning the constitutionality of a statute, we are guided by a number of well-established principles. A statute is presumed to be constitutional, and the burden of proving the contrary is on the person attacking the statute. *People v. Velasquez*, 666 P.2d 567, 569 (Colo. 1983); *People v. Alexander*, 663 P.2d 1024, 1027 (Colo. 1983). Where, as in this case, the challenged statute does not involve a suspect classification or touch upon a fundamental right, the court will uphold a statutory classification if it is reasonably related to a legitimate governmental interest. *People v. Velasquez; Dawson v. Public Employees Ass'n*, 664 P.2d 702, 707 (Colo. 1983). Because "[e]qual protection of the law is a guarantee of like treatment of all those who are similarly situated," this court has held that conviction under a statutory scheme "which prescribes different degrees of punishment for the same acts committed under like circumstances by persons in like circumstances is violative of a person's right to equal protection of the laws." *People v. Calvaresi*, 188 Colo. 277, 282, 534 P.2d 316, 318 (1975).

The differences between practitioners and non-practitioners justify imposing on practitioners a lesser degree of punishment for unlawful possession of cocaine. The General Assembly reasonably could have concluded that a lesser punishment for practitioners was appropriate because practitioners are engaged in an occupation that regularly requires the administration, dispensation, and possession of controlled substances. The statutory classification drawn by sections 18-18-105 and 12-22-314 is reasonably related to a legitimate governmental interest, and the defendant's conviction under section 18-18-105 did not deny him equal protection.[3]

II.

Both the federal and state constitutions provide protection from unreasonable searches and seizures.[4] The defendant asserts that his conviction cannot stand because it rested on the admission of evidence obtained in violation of these constitutional provisions. He argues first that the retention of his safe by police officers after it had been recovered from the burglars' automobile constituted an illegal seizure of the safe. We disagree.

One of the definitions of a "seizure" within the meaning of the prohibition against unreasonable searches and seizures in the federal constitution is "a forcible or secretive dispossession of something against the will of the possessor or owner." *United States v. Haden*, 397 F.2d 460, 465 (5th Cir. 1968), *cert. denied*, 396 U.S. 1027 (1970); *see also United States v. Thomas*, 613 F.2d 787, 793 (10th Cir. 1980), *cert. denied*, 449 U.S. 888; *United States v. White*, 268 F. Supp. 998, 1003 (D.D.C. 1966). In light of this definition, it would be difficult to characterize the detention of the defendant's safe by the police from the time they recovered it from the burglars' automobile until the next day when the safe was opened as a "seizure." As the People observe, there is no indication in the record that the defendant ever directly requested the return of the safe after the police took custody of it in a lawful manner. The defendant asked Detective Turner when he could recover the safe, and he apparently did not demur when Turner replied that the defendant might arrange for its release "probably the following day or so." The detention of the safe was not the result of the defendant's having been forcibly or secretly dispossessed of the safe against his will.

However, even assuming that the detention of the safe may be characterized as a "seizure," we are not prepared to say that the seizure was illegal. Where police officers lawfully come into possession of property it is not unreasonable *per se* for them to detain the property for possible use as evidence. *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980); *United States v. Farrell*, 606 F.2d 1341 (D.C. Cir. 1979). Of course, even where the initial seizure of property by police officers was valid, the circumstances of the subsequent detention may render the detention unreasonable. *See United States v. Jacobsen*, 104 S. Ct. 1652, 1662 (1984); *United States v. Place*, 462 U.S. 696 (1983). In *Place*, the United States Supreme Court determined that the reasonableness of a detention of property initially seized in a lawful manner should be assessed by "balanc[ing] the nature and quality of [the] intrusion on the individual's Fourth Amendment [possessory] interests against the importance of governmental interests alleged to justify the intrusion." 462 U.S. at 703; *see also Jacobsen*, 104 S. Ct. at 1662-1663.

Applying these principles to the facts before us, we conclude

that the detention of the defendant's safe, after it was recovered from the burglars' automobile until the safe was opened and the cocaine discovered, was not an unconstitutional seizure of the safe. The police officers came into possession of the safe lawfully. They had a legitimate interest in retaining the safe for possible use as evidence in the prosecution of the individuals who had stolen it from the defendant's home.[5] The interference with the defendant's possessory interest in the safe was relatively minimal: the safe was held in police headquarters only overnight before the search warrant was obtained. This limited intrusion on the defendant's possessory right to the safe does not outweigh the interests of the police officers in retaining the safe for the period of time at issue here.

III.

The defendant next urges that submitting his safe to a sniff by the narcotics detection dog was a search, not justified by probable cause or a reasonable suspicion to believe that the safe contained contraband, that violated the constitutional prohibitions against unreasonable searches. We are not the first court to consider whether a sniff by a narcotics detection dog is a search. In *United States v. Place*, 462 U.S. 696, the Supreme Court determined that, under the circumstances there, a dog sniff was not a search. The Court, analyzing the question in the context of an alleged "search" by a dog sniff of the respondent's luggage at an airport, reasoned as follows:

> A "canine sniff' by a well-trained narcotics detection dog...does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage.
>
> Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited.
>
> This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and

more intrusive investigative methods.

> In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine — did not constitute a "search" within the meaning of the Fourth Amendment.

462 U.S. at 707.

The Court's conclusion with respect to the dog sniff issue in *United States v. Place* "represents the culmination of an overwhelming trend among the courts." Comment, *The Constitutionality of the Canine Sniff Search: From Katz to Dogs*, 68 Marquette L. Rev. 57, 81 (1984). Prior to *Place*, the majority of the federal circuit courts of appeals had decided that a dog sniff is not a search *per se*; numerous state courts had rendered similar decisions.[6] Many of these courts, like the Court in *Place*, grounded their decisions on the peculiarly nonintrusive and discriminating nature of an investigatory dog sniff. Some analogized the use of trained dogs to detect narcotics to the use of certain sense-enhancing instruments such as binoculars and flashlights that have not been considered searches.[7] A few of these courts adopted what has been referred to as the "plain smell" doctrine, holding that there can be no reasonable expectation of privacy and, consequently, no constitutionally protectable interest, in the odors emanating from a closed container.[8]

Most commentators who have considered the issue, and a small minority of courts, have characterized a dog sniff as a search.[9] These courts and commentators compare the use of dogs to detect narcotics to the use of electronic "bugs," magnetometers, and similar investigative devices. Perhaps the clearest expression of the minority position is found in the concurring opinion in *United States v. Bronstein*, 521 F.2d 459 (2d Cir. 1975), *cert. denied* 424 U.S. 913 (1976). There, Judge Mansfield made the following observations:

> There is no legally significant difference between the use of an X-ray machine or magnetometer to in-

> vade a closed area in order to detect the presence of a metal pistol or knife, which we have held to be a search***, and the use of a dog to sniff for marijuana inside a private bag. Each is a non-human means of detecting the contents of a closed area without physically entering into it. The magnetometer ascertains whether there is metal in the hidden space by detecting changes in the magnetic fields surrounding the area of the hidden space. The dog uses its extremely sensitive olfactory nerve to determine whether there are marijuana molecules emanating from the hidden space. Neither constitutes a particularly offensive intrusion, such as ransacking the contents of the hidden space, or exposing a person to indignities in the case of a personal search. But the fact remains that each detects hidden objects without actual entry and without the enhancement of human senses. The fact that the canine's search is more particularized and discriminate than that of the magnetometer is not a basis for a legal distinction. The important factor is not the relative accuracy of the sensing device but the fact of the intrusion into a closed area otherwise hidden from human view, which is the hallmark of any search.

521 F2d at 464.

The defendant urges us to adopt the minority view, pointing out that in the past we have interpreted Article II, section 7, of the state constitution to provide greater protection for the individual from governmental investigative techniques than is provided by United States Supreme Court interpretations of the corresponding provision of the federal constitution. For example, in *People v. Sporleder,* 666 P.2d 135 (1983), we held that the use of electronic pen registers to record numbers dialed from a private telephone was a search under the state constitution even though the United States Supreme Court in *Smith v. Maryland,* 422 U.S. 735 (1979), had decided that the use of a pen register did not amount to a search under the fourth amendment to the federal constitution. *See also People v. Oates,* 698 P.2d 811 (Colo. 1985) (installation of electronic beeper constitutes search under state constitution); *Charnes v. DiGiacomo,* 200 Colo. 94, 612 P.2d 1117 (1980) (governmental

use of individual's bank records is a search under state constitution).

Analysis of protection for the individual against governmental investigative techniques under both the state and federal constitutions begins with *Katz v. United States,* 389 U.S. 347 (1967). *People v. Oates,* 698 P.2d at 814. When a defendant challenges governmental investigative activity involving an intrusion into his privacy, *Katz* requires a two-step inquiry: (1) was the intrusion a search; (2) if so, was it a reasonable search. The first question, whether the intrusion was a search, is answered by determining whether the individual had a reasonable expectation of privacy with respect to the object of the governmental intrusion. The answer to the second question, whether the search was reasonable, depends on whether prior judicial approval was obtained; if not, the search was "*per se* unreasonable" unless the intrusion fits within an established exception to the warrant requirement. *See* Peebles, "*The Uninvited Canine Nose and the Right to Privacy: Some Thoughts on Katz and Dogs,*" 11 Georgia L. Rev. 75, 81-82 (1976).

Whether a dog sniff constitutes a search turns first on whether it was an intrusion into something that the individual reasonably expected to be private. The analysis in many of the dog sniff cases has stopped with the determination that a dog sniff, much less intrusive than a typical search, is not an invasion of a reasonable expectation of privacy. *See, e.g., United States v. Place,* 462 U.S. at 707; *People v. Mayberry,* 31 Cal. 3d 335, 644 P.2d 810, 813, 182 Cal. Rptr. 617 (1982). Conceding that dog sniffs are less intrusive than other types of investigative techniques, we still must consider whether the limited intrusiveness of the sniff is an invasion of a reasonable expectation of privacy. Most of the cases in which courts have concluded that a dog sniff is not a search have involved either luggage or closed containers in an airport where, for safety reasons, people may expect their luggage or parcels to be subject to some type of governmental inspection. *See, e.g., United States v. Place; United States v. Goldstein,* 635 F.2d 356 (5th Cir. 1981), *cert. denied,* 452 U.S. 962; *United States v. Klein,* 626 F.2d 22 (7th Cir. 1980); *United States v. Sullivan,* 625 F.2d 9 (4th Cir. 1980), *cert. denied* 450 U.S. 923; *United States v. Bronstein; People v. Mayberry; People v. Salih,* _____Cal. App. 3d_____, 219 Cal Rptr. 603 (1985); *State v. Snitkin,* 681 P.2d 980 (Hawaii 1984).

Although we need not make the decision in this case, it may

well be, as a majority of courts have held, that when a dog is used to sniff luggage or parcels at an airport, the sniff does not constitute a search because the persons whose luggage or parcels are sniffed have no reasonable expectation of privacy from an investigative technique as non-intrusive as a dog sniff. However, the facts of the case before us do not lend themselves to the same mode of resolution because the defendant, or anyone in his situation, could have no expectation that the privacy provided by a locked safe in his basement would be subject to a governmental investigative technique of any sort.[10] Therefore, we determine that, because the defendant had a reasonable expectation of privacy in the safe, the dog sniff was a search.

Our holding that the dog sniff of the defendant's safe was a search is only the first step of the analysis. We must also determine, considering all the circumstances of the search, whether the warrantless search was unreasonable. As noted earlier in this opinion, warrantless searches are presumptively unreasonable. *Chimel v. California,* 395 U.S. 752 (1969); *People v. Turner,* 660 P.2d 1284, 1287 (Colo. 1983). Moreover, even in the limited types of situations in which a warrantless search or seizure might be justified, the requirement of probable cause to obtain a warrant has generally been retained. *See, e.g., People v. Bustam,* 641 P.2d 968 (Colo. 1982); *People v. Cunningham,* 194 Colo. 198, 570 P.2d 1086 (1977).

In this case we must determine whether a warrant is necessary before a dog sniff, and, if not, the proper standard for a warrantless sniff. One of the situations in which a warrantless search based on something less than probable cause may be justified is the type of situation presented in *Terry v. Ohio,* 392 U.S.1 (1968). In *Terry,* the United States Supreme Court held that the warrantless stop and frisk for weapons of a criminal suspect on the street is permissible where the police officers have a reasonable suspicion based on "specific and articulable facts" to believe that the suspect is armed. 392 U.S. at 21. The rationale of *Terry,* which this court adopted in interpreting the state constitution, *People v. Tate,* 657 P.2d 955 (Colo. 1983); *People v. Casias,* 193 Colo. 66, 563 P.2d 926 (1977); *Stone v. People,* 174 Colo. 504, 485 P.2d 495 (1971), is that the nature of a particular type of search is relevant to the question whether the search was reasonable. The Court in *Terry* stated:

> In order to assess the reasonableness of [a protective patdown search] as a general proposition, it is necessary "first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to search...against the invasion which the search...entails."

392 U.S. at 20-21 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 534-535, 536-537 (1967)).

If the reasonableness of dog sniff searches is analyzed in terms of the methodology set out in *Terry*, it has been suggested that this type of search is justified where the police have a reasonable suspicion to believe that the object to be searched contains drugs. *See United States v. Place*, 462 U.S. at 723 (Blackmun, J., concurring in the judgment) ("A dog sniff may be a search, but a minimally intrusive one that could be justified in this situation under *Terry* upon mere reasonable suspicion.") *Pooley v. State*, 705 P.2d 1293, 1311 (Alaska App. 1984). *See also* Peebles, *supra*, at 75 (1976); Note *Police Use of Sense-Enhancing Devices and the Limits of the Fourth Amendment*, 1977, Ill. L. F. 1167; W. LaFave, *supra*, §2.2

We are convinced that the balance between governmental and individual interests in this case can best be struck by requiring only reasonable suspicion as a prerequisite for the sniff search. The government's interest in suppressing the use and distribution of illegal drugs is compelling. On the other side of the balance, as the facts of this case illustrate, a search by a narcotics detection dog generally involves far less an intrusion than any other type of search technique because the sniff is uniquely selective, detecting in most cases only the presence of narcotics. *See, e.g., United States v. Place; see also* W. LaFave, *supra*, § 2.2; Peebles, *supra*, at 89; Note, *Constitutional Limitations on the Use of Canines to Detect Evidence*, 44 Fordham L. Rev. 973, 986-87 (1976).

The defendant contends that even if an exploratory dog sniff may be justified on the grounds of reasonable suspicion, the requisite reasonable suspicion in this case was not met by the facts known to the officers prior to the dog sniff. In other contexts we have held that "specific and articulable facts...together

with the rational inferences from these facts" may give rise to a reasonable suspicion. *People v. Wells,* 676 P.2d 693, 701 (Colo. 1984); *People v. Davis,* 669 P.2d 130, 134 (Colo. 1983); *People v. Thomas,* 660 P.2d 1272, 1274 (Colo. 1983). Here, Officer Turner testified that his suspicion that the defendant's safe contained drugs was based on the following facts: the statement made to him by one of the burglars about the alleged contents of the safe; the discovery of the white-coated scales, playing card, mirror and spoons; and the card produced from vice bureau files.

The defendant argues that the paraphernalia found in the basement must be excluded as a basis for reasonable suspicion because the scales, mirror, spoons and playing card were observed in the course of an invalid search. Under the emergency exception to the warrant requirement, police officers may enter private property without a warrant where there is a reasonable belief that the premises have been or are being burglarized in order to secure the premises and to search for suspects and victims. *People v. Berow,* 688 P.2d 1123 (Colo. 1984); *Commonwealth v. Fiore,* 9 Mass. App. 618, 403 N.E.2d 953 (1980), *cert. denied,* 449 U.S. 938; *State ex rel. Zander v. District Court,* 180 Mont. 548, 591 P.2d 656 (1979). *See also* W. LaFave, *supra,* §6.6 Any search justified under the emergency doctrine, however, is limited by the nature of the emergency; an emergency cannot be used to support a general exploratory search. *People v. Reynolds,* 672 P.2d 529 (Colo. 1983); *People v. Roark,* 643 P.2d 756 (Colo. 1982). Where police officers are legitimately on the premises under the emergency doctrine, they may seize incriminating evidence discovered in plain view. *People v. Reynolds; People v. Clements,* 661 P.2d 267 (Colo. 1983). By the same token police officers are entitled to rely on observations of things in plain view during the course of a valid search under the emergency doctrine.

Here there is no question that the warrantless entry by the police into the defendant's house was justified by a reasonable belief that the house recently had been burglarized. More problematic is the significance of the fact that at some point after entering the house Detective Turner may have expanded his search beyond the bounds established by the emergency doctrine. Unlike the searches involved in *People v. Berow* and *State ex. rel. Zander v. District Court,* the search in this case was not

confined to "areas where a person could conceivably hide," *People v. Berow*, 688 P.2d at 1128: Detective Turner testified that during the course of the search he opened dresser drawers as well as closets.

The defendant asserts that by opening drawers Detective Turner tainted the entire search after the initial entry into the house. The People suggest that only the portion of the search occurring after the drawers were opened was invalid.[11] In our view, neither of these positions gives sufficient weight to the fact that Detective Turner's observation of the paraphernalia was not the product of the arguably overbroad aspects of the search. Rather, Detective Turner observed the paraphernalia in plain view in an area that he was justified in searching under the emergency doctrine. Under the circumstances of this case, the exclusion of the scales, spoons, mirror and playing card from the calculation of reasonable suspicion is not required.

The defendant advances other reasons why the facts of this case do not provide a basis for reasonable suspicion that his safe contained drugs. He points out that the white coating on the items found in the basement was not chemically analyzed and that Detective Turner did not recognize immediately the significance of the items as cocaine paraphernalia. The defendant also notes that at the time the burglar made his statement about the contents of the safe to Turner the detective did not give the statement much credence. Finally, the defendant notes that the card taken from the vice bureau files was two years old and contained inaccurate information.

It may well be that any of the facts discussed above, taken in isolation, would be an insufficient foundation for a reasonable suspicion that drugs were in the defendant's safe, but it is apparent from the record that Detective Turner's suspicion concerning the safe resulted from the combination of these facts. In view of the totality of the facts, the inference drawn by Detective Turner was reasonable. Accordingly, we uphold the district court's ruling that the officers had adequate suspicion to justify submitting the safe to a dog sniff.

IV.

The defendant next argues that the affidavit in support of the warrant to search his safe contained information that must be stricken and that without this information the affidavit is insufficient to establish probable cause for issuance of a warrant to open the safe. We already have determined that Detective Turner's observation of the scales, spoons and playing card was the result of a lawful search and that the safe was properly submitted to a dog sniff. Therefore, information concerning these events was appropriately included in the affidavit. Additionally, the defendant contends that references in the affidavit to the statement made by the burglar to Detective Turner and to the police file card were misleading or flawed by material omissions. In *People v. Ellis*, 189 Colo. 242, 245, 539 P.2d 132, 135 (1975), we held that "[a]ny statement included in an affidavit for a search warrant known to the affiant to be false, inaccurate or misleading must be stricken and cannot be considered in determining whether the substance of the affidavit justified the issuance of a search warrant." Here, the burglar denied making any statement to Detective Turner about the contents of the defendant's safe. However, Detective Turner testified under oath that the burglar told him that he thought the safe might contain drugs. Thus there is sufficient evidence in the record to support the detective's inclusion of the burglar's statement in the affidavit. This statement as recounted in the affidavit was to the effect that the burglar told Detective Turner that he *knew* rather than *thought* the safe contained money and drugs. However, there is no indication in the record that this discrepancy in the description of the hearsay statement was the result of a deliberate attempt on the part of Detective Turner to influence the magistrate's determination of probable cause by providing false information. Further, the difference between the version of the statement testified to by Detective Turner and the statement recounted in the affidavit, for purposes of establishing probable cause, is insignificant.

The defendant also characterizes as a material omission the failure to include in the affidavit the facts that 1) the vice bureau file card had not been updated for two years and 2) the card gave the address of Darrell Norman Unruh as 1050 South Columbine. In *People v. Winden*, 689 P.2d 578, 583 (Colo. 1984), we stated that an omitted fact was material for purposes

of vitiating an entire affidavit "only if its omission rendered the affidavit substantially misleading to the judge who issued the warrant." *See also People v. Kurland*, 618 P.2d 213, 168 Cal. Rptr. 667 (1980), *cert. denied* 451 U.S. 987 (1981). By the same token, omission of facts relative to a statement in an affidavit should require striking the statement only if the statement is substantially misleading without the missing facts. In our consideration, omission of the facts pertaining to the file card do not meet this test of materiality. We decline to strike any of the information contained in the affidavit.

V.

The defendant's final argument is that even if all the information in the affidavit is retained the affidavit did not establish probable cause to open and search the safe. An affidavit supporting a search warrant establishes probable cause for the issuance of a warrant if it alleges sufficient facts for a person of reasonable caution to believe that contraband or material evidence is located in the place to be searched. *People v. Conwell*, 649 P.2d 1099, 1101 (Colo. 1982). Further, probable cause depends upon probabilities, not certainties, and upon knowledge grounded in the practical considerations of every day life on which reasonable and prudent persons act. *People v. Chase*, 675 P.2d 315, 317 (Colo. 1984); *People v. McFall*, 672 P.2d 534, 538-39 (Colo. 1983); *Conwell*, 649 P.2d 1100-01. Finally, in resolving questions about probable cause a court must interpret the affidavit in a common sense and realistic fashion without imposing technical requirements of elaborate specificity. *People v. Chase*, 675 P.2d at 317; *People v. Conwell*, 649 P.2d at 1101-02.

The primary focus of the defendant's challenge to the affidavit is the paragraph pertaining to the exposure of the safe to the narcotics detection dog. That paragraph reads as follows:

> On September 30, 1981 at 12:30 p.m. Det. Sanchez, Det. Scanlan, and Officer W. Schell 68-100 responded to the Custodians Office with a Narcotics sniffing dog "Nick", and upon doing so the dog was brought to the room where the same safe was along with other items in the room and the dog immediately responded to the safe and pawed at it. The dog was then taken from the room and brought back and he immediately went to the same safe again. This dog "Nick", has

> had one and half years service in the Narcotic detection with three confirmed hits on drugs. The drugs were Cocaine and Hashish. The dog has continuous training of a minimum of one hour a day involving Narcotics detection.

The defendant contends that the affidavit fails to indicate the source of the information about the dog, provides an inadequate description of the dog's training and success in predicting the presence of drugs, and does not explain the significance of the dog's reaction to the safe.

We agree with the People that a magistrate legitimately could infer from the affidavit that the source of Turner's information about the dog was a fellow officer. *Cf. People v. Turner*, 660 P.2d 1284 (Colo. 1983). We also agree with the People that the description of the dog's training and accuracy in the affidavit was sufficient to permit the magistrate to independently assess the dog's reliability. Other courts have concluded that similar statements about the qualifications of narcotics detection dogs supplied an adequate basis for a finding of probable cause. *See, e.g., United States v. Sentovich*, 677 F.2d 834, 838 n.8 (11th Cir. 1982) (dictum); *United States v. Klein*, 626 F.2d 22, 27 (7th Cir. 1980); *United States v. Venema*, 563 F.2d 1003, 1007 (10th Cir. 1977); *United States v. Meyer*, 536 F.2d 963 (1st Cir. 1976); *United States v. Watson*, 551 F. Supp. 1123 (D.D.C. 1982). Requiring "a formal recitation of a police dog's *curriculum vitae*," *United States v. Watson*, 551 F. Supp. at 1127, could lead to endless challenges to the facial sufficiency of affidavits based on the failure to include in minute detail information of dubious value about the background of the dog involved. For much the same reason we reject the assertion that common sense is incapable of supplying the connection between the dog's reaction to the safe, as described in the affidavit, and the inference that the safe contained drugs.

We conclude that the affidavit, read as a whole, established probable cause to issue the warrant to search the defendant's safe.

Judgment affirmed.

JUSTICE ROVIRA specially concurs, and JUSTICE ERICKSON joins in the special concurrence.

FOOTNOTES

1. Because the defendant challenges the constitutionality of a state statute, jurisdiction to consider this appeal is in this court under section 13-4-102 (1)(b), 6 C.R.S. (1973 and 1985 Supp.).

2. The fourteenth amendment to the United States Constitution provides in part, "No state shall...deny to any person within its jurisdiction the equal protection of the laws." A similar guarantee of equal protection is implicit in the due process provision of the state constitution. *Colo. Const.*, art. II, § 25. *People v. March*, 628 P.2d 69 (Colo. 1981); *People v. Taggart*, 621 P.2d 1375 (Colo. 1981); *Heninger v. Charnes*, 200 Colo. 194, 613 P.2d 884 (Colo. 1980).

3. The People suggest that because the definition of a practitioner is limited to a person "acting within his authority to prescribe drugs," the mere possession of cocaine by a practitioner who does not prescribe the drug would in fact be punishable as a felony under section 18-18-105. The defendant argues that this construction would render section 12-22-314 (l)(m) meaningless. We need not resolve this conflict here because we conclude that even if the defendant is correct in his assertion that a practitioner may be punished only as a misdemeanant for simple possession of cocaine, the distinction between the degrees of punishment mandated by sections 12-22-314 (l) (m) and 18-18-105 retains a rational basis. A practitioner convicted under section 12-22-314 (l) (m) for simple possession of cocaine obtained from an unlawful source would be subject, depending on the circumstances, to other sanctions, including loss of license to issue prescriptions.

   In his supplemental list of authorities filed with this Court two weeks before oral argument, the defendant raised a new equal protection argument. He asserted that his conviction under section 18-18-105 as a class 3 felon for possession of cocaine is violative of equal protection because section 18-18-104, 8 C.R.S. (1985 Supp.), punishes the *use* of cocaine as a class 5 felony. The defendant raised this issue too belatedly for us to consider it. *Massey v. People*, 656 P.2d 658 (Colo. 1982).

4. The fourth amendment to the United States Constitution declares in part: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated." Article II, § 7, of the Colorado Constitution provides in part: "The people shall be secure in their persons, papers homes and effects, from unreasonable searches and seizures."

5. Although the defendant contends that the safe was not in fact "retained for any evidentiary purposes in the burglary investigation as no fingerprints were sought to be lifted from the safe," and the record shows that the police believed an attempt to obtain fingerprints from the safe would have been futile because "[i]t had been touched too many times," we cannot say that the safe's only possible value as evidence against the burglars was as a source of fingerprints.

6. *See, e.g., United States v. Lewis*, 708 F.2d 1078 (6th Cir. 1983); *United States v. Waltzer*, 682 F.2d 370 (2d Cir. 1982), *cert. denied*, 463 U.S. 1210 (1983); *United States v. Goldstein*, 635 F.2d 356 (5th Cir. 1981), *cert. denied*, 452 U.S. 962; *United States v. Klein*, 626 F.2d 22 (7th Cir. 1980); *United States v. Sullivan*, 625 F.2d 9 (4th Cir. 1980), *cert. denied*, 450 U.S. 923 (1981); *United States v. Race*, 529 F.2d 12 (1st Cir. 1976); *United States v. Bronstein*, 521 F.2d 459 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); *United States v. Fulero*, 498 F.2d 748 (D.C. Cir. 1974); *People v. Mayberry*, 31 Cal. 3d 335, 644 P.2d 810, 182 Cal. Rptr. 617 (1982); *State v. Morrow*, 128 Ariz. 309, 625 P.2d 898 (1981); *People v. Price*, 54 N.Y.2d 557, 446 N.Y.S.2d 906, 431 N.E.2d 267 (1981); *State v. Mosier*, 392 So.2d 602 (Fla. App. 1981); *State v. Wolohan*, 23 Wash. App. 813, 598 P.2d 421 (1979).

7. *See, e.g., United States v. Bronstein*, 521 F.2d 459 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976).

8. *See, e.g., United States v. Sullivan*, 625 F.2d 9 (4th Cir. 1980), *cert. denied*, 450 U.S. 923 (1981); *United States v. Venema*, 563 F.2d 1003 (10th Cir. 1977); *United States v. Bronstein*, 521 F.2d 459 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); *People v. Mayberry*, 31 Cal. 335, 664 P.2d 810, 182 Cal. Rptr. 617 (1982); *State v. Wolohan*, 23 Wash. App. 813, 598 P.2d 421 (1979).

9. For commentary representative of this view, see, *e.g.*, Comment, *The Constitutionality of the Canine Sniff Search: From Katz to Dogs*, 68 Marquette L. Rev. 57 (1984); Comment, 13 San Diego L. Rev. 410 (1976); Note, *Constitutional Limitations on the Use of Canines to Detect Evidence*, 44 Fordham L. Rev. 973 (1976).
   The few court decisions concluding that a dog sniff is a search include *United States v. Beale*, 674 F.2d 1327 (9th Cir. 1982), *vacated and remanded*, 463 U.S. 1202 (1983), *on rehearing*, 736 F. 2d 1289 (1984), *cert. denied*, 105 S. Ct. 565; *United States v. Solis*, 393 F. Supp. 325 (C.D. Cal. 1975), *rev'd* 536 F.2d 880 (9th Cir. 1976); *People v. Evans*, 65 Cal. App. 3d 924, 134 Cal. Rptr. 436 (1977); *State v. Elkins*, 47 Ohio App. 2d 307, 354 N.E.2d 716 (1976).
   In *Pooley v. State*, 705 P.2d 1293 (Alaska App. 1985), a case decided after *Place*, the Alaska Court of Appeals held that a dog sniff is a search under the state constitution.
   The courts in *Horton v. Goose Creek Consolidated Indep. School Dist.*, 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 3536 (1983), and *Jones v. Latexo Indep. School Dist.*, 499 F. Supp. 223 (E.D. Tex. 1980), held that use of trained dogs to sniff the persons of school students constituted an unreasonable search. *But see Doe v. Renfrow*, 475 F. Supp. 1012 (N.D. Ind. 1979) (submission of junior and senior high school students to dog sniff did not constitute search).

10. Here, unlike the cases involving dog sniffs at airports, the defendant did not cause the object of the sniff to be in a place where it would likely be subjected to any type of examiniation. The fact that the safe legitimately came into the hands of the police, through a series of events quite beyond the defendant's knowledge or control, does not diminish his privacy interest in the contents of the safe. *Cf. United States v. Chadwick*, 433 U.S. 1, 13-14 n. 8 (1977). And while the defendant's failure to demand the immediate return of the safe is relevant to the propriety of detaining the safe at police headquarters for possible use in prosecuting the burglars, the defendant cannot be said to have consented to an examination of the contents of the locked safe.

11. The record does not indicate when in the course of the search the drawers were opened.

PEOPLE v. UNRUH No. 83SA299

JUSTICE ROVIRA specially concurring:

I disagree with the majority's conclusion that the dog sniff in this case constituted a search.

As the majority points out, the beginning point in analyzing the constitutionality of the canine sniff is *Katz v. United States*, 389 U.S. 347 (1967). *Katz* established a two-prong analysis for testing the validity of investigative techniques under the fourth amendment. Under *Katz*, it must first be decided whether the activity was a search; if it was a search, it must then be determined whether the search was reasonable. The facts of this case, in addition to the overwhelming applicable case law, lead me to conclude that the sniff of Unruh's safe was not a search, and that the police conduct at all times was reasonable.

In determining whether the sniff was a search, it is necessary to decide whether the defendant had a reasonable expectation of privacy in the object of the police investigation. Before answering this question, however, a brief recitation of the facts is necessary. The object of the police investigation in this case was defendant's safe, initially discovered by the police in the open trunk of a car parked on a public street. The safe had been recently stolen from the defendant's nearby home. Before removing the safe to the police station for evidentiary purposes, the police were informed by one of the suspected burglars of the safe that it contained money and drugs. A search of the defendant's house revealed drug paraphernalia. The police also learned that the defendant was a suspected cocaine dealer. It is also significant that the defendant did not request the return of the safe after the police took custody of it. Cognizant of these facts, the detectives decided to submit the safe to a dog sniff. The dog's reaction to the safe indicated that it contained drugs.

The question under *Katz*, in determining whether the sniff of the safe constituted a search, is whether the defendant exhibited an actual expectation of privacy in the safe and, if so, whether the expectation is one "that society is willing to recognize as 'reasonable'" *Katz*, 389 U.S. at 361 (Harlan, J., concurring). In applying this analysis, it is reasonable to conclude that the defendant did not exhibit an actual expectation of privacy in the safe. This conclusion is supported by the fact that "there is no

indication in the record that the defendant ever directly requested the return of the safe after the police took custody of it in a lawful manner." Majority op. at 6. However, conceding that the defendant did exhibit an actual or "subjective" expectation of privacy in the safe, I am convinced that the expectation is not one that society is prepared to recognize as reasonable.

The luggage sniff cases contain helpful reasoning which applies equally well to this case. The leading case involving a dog sniff of luggage is *United States v. Place*, 462 U.S. 696 (1983). In *Place*, the defendant was a suspected drug courier who had his luggage detained for 90 minutes by members of the Drug Enforcement Administration. During this time, the D.E.A. agents transported the luggage to another location to be examined by a detector dog. The sniff indicated drugs, and the defendant was subsequently convicted of possession of narcotics. On review, the Supreme Court, while holding that the seizure of defendant's luggage was unreasonable under the fourth amendment due to the duration of its detention, also held that the sniff of the luggage was not a search. Id. at 707.

The majority quotes at length from *Place* and correctly identifies "the peculiarly nonintrusive and discriminating nature of an investigatory dog sniff," as the underlying rationale for holding a sniff not to be a search. Majority op. at 9-10. Yet, the majority reasons that the defendant "could have [had] no expectation that the privacy provided by a locked safe in his basement would be subject to a governmental investigative technique of any sort." Majority op. at 13. The locked safe, however, was not in the defendant's basement at the time of the dog sniff — it was at the police station. The defendant did not demand the return of the safe, nor did he object to the safe being in the temporary custody of the police. Hence, I believe that the rationale of *Place* applies with equal force to the facts of this case and, accordingly, that the majority errs in concluding that the sniff was a search.

In support of its holding that the sniff was a search, the majority cites the "small minority" of cases holding that a dog sniff of an object constitutes a search. *See* majority op. at 25-26 n.9. However, all but one of these cases were decided prior to *Place*, which was decided in 1983. This "small minority" of courts is actually smaller than the majority opinion suggests.

First, *United States v. Beale,* 674 F.2d 1327 (9th Cir. 1982), *vacated and remanded,* 103 S. Ct. 3529 (1983), *rev'd on rehearing,* 736 F.2d 1289 (1984), *cert. denied,* 105 S. Ct. 565, provides no support at all for the proposition that a sniff of an object is a search. In *Beale,* The Ninth Circuit originally held that a sniff of luggage constituted a limited fourth amendment intrusion, but that decision was vacated by the Supreme Court in light of *Place.* On remand, the Ninth Circuit held that the canine sniff was not a search under the fourth amendment. Similarly, *United States v. Solis,* 393 F. Supp. 325 (C.D. Cal. 1975), *rev'd,* 536 F.2d 880 (9th Cir. 1976), provides no support for the majority's conclusion because the district court decision was reversed by the court of appeals, which was held that a dog sniff of a trailer suspected of containing marijuana was not a search.

People v. Evans, 65 Cal. App. 3d 924, 134 Cal. Rptr. 436 (1977), is also of dubious value. *Evans* is factually distinguishable on the ground that the dog sniff apparently was conducted as part of a general, exploratory search. There, the court stated:

> It does affirmatively appear that the dogs were used to sniff around all of the [storage] compartments and that their use so far as the record is concerned appears to have been a seeking out and exploratory in nature. A review of the cases supports the conclusion that such a search with canines conducted without some preknowledge or reasonably strong suspicion that contraband is to be found in a particular location is a constitutionally impermissible invasion of the suspects' reasonable expectations of privacy and consequently a violation of the Fourth Amendment.

Evans, 134 Cal. Rptr. at 441. In the instant case, however, the police did have a reasonable suspicion or some preknowledge of the safe's contents: the burglary suspect told the police the safe contained drugs, cocaine paraphernalia was found in the defendant's house, and police files indicated that the defendant was a suspected drug dealer.

Pooley v. State, 705 P.2d 1293 (Alaska App. 1985), is the only state court since *Place* to hold that a sniff of luggage constitutes a search. However, the sniff in *Pooley* was held to be a minimally intrusive search under the Alaska Constitution. The Alaska court did not hold that the sniff constituted a search

under the fourth amendment of the United States Constitution. *Id.* at 1311.

The cases cited by the majority involving the use of trained dogs to sniff students have no bearing on this case whatsoever. Here, the dog sniffed a safe, not a person.

In effect, the majority cites only one case which still stands for the proposition that a sniff of an object constitutes a fourth amendment search, *State v. Elkins*, 47 Ohio App. 2d 307, 354 N.E.2d 716 (1976). This single state appellate court decision, decided prior to *Place*, hardly provides a sound basis for holding a sniff of an object to be a search. The persuasiveness of the majority's conclusion is further diminished in light of the cases which, since *Place*, have decided whether a sniff of an object is a search. Since *Place*, federal and state courts have unanimously agreed that a dog sniff of an inanimate object found in a public place does not constitute a search under the fourth amendment. *See, e.g., United States v. Dicesare*, 765 F.2d 890, 897 (9th Cir. 1985) (canine's sniff of a car trunk was not a "search" requiring probable cause), *amended by* 777 F.2d 543; *People v. Salih*, _____ *Cal App. 3d*_____, *219 Cal. Rptr. 603, 606 (1985)* ("It is now settled that exposing personal property to the sniff of a trained narcotics detecting dog is not a 'search' for Fourth Amendment purposes."); *State v. Snitkin*, 681 P.2d 980, 983 (Hawaii 1984) (dectection dog's sniff of a package was not a fourth amendment search); *Strout v. State*, 688 S.W.2d 188, 191 (Tex. Crim. App. 1985) (dog's sniffing in the aisle in front of defendant's safety deposit boxes was not a fourth amendment search because defendant did not have a legitimate expectation of privacy in the aisle in front of his boxes).

The facts of the instant case and the majority's analysis present no convincing reason to depart from the rule established in *Place* and consistently followed by other courts. Accordingly, I respectfully dissent from that portion of part III of the majority opinion that holds the sniff to be a search.

I am authorized to say that JUSTICE ERICKSON joins me in this special concurrence.

APPENDIX B

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 82CR0025, Courtroom Eighteen

REPORTER'S TRANSCRIPT

PEOPLE OF THE STATE OF COLORADO
v.
DARRELL UNRUH and KATHLYN UNRUH,
Defendants.

The hearing in this matter commenced on Friday, May 21, 1982, and concluded on Monday, May 24, 1982, before the HONORABLE JOHN BROOKS, JR., Judge of the District Court.

APPEARANCES:
For the People: DAVID HECKENBACH, DEPUTY DISTRICT ATTORNEY.
For the Defendants: JEFFREY SPRINGER, ATTORNEY AT LAW.
For the Defendant, Darrel Unruh: RICHARD BERMAN, ATTORNEY AT LAW.

What has it done on other occasions? They don't say three out of five, and they don't say 80 percent. Reliability is a big issue and it has to be supplied to us by the four corners of this affidavit.

But, again, *Jackson* controls this case. *Jackson* mandates the affidavit be deemed to be insufficient for the failure to provide the source of information concerning the dog-sniffing of the safe. If that's the case, the search warrant is invalid because it wasn't issued under a proper affidavit, and the fruits of the search must be suppressed. And we would ask the Court to so rule.

Thank you.

THE COURT: All right, sir. Well, it's not a particularly easy decision to make in view of the arguments made by Counsel which raise a number of issues.

Let me read this, just for a mintute.

Well, the record should reflect the Court has taken time to read the *Jackson* case and the *Ball* case in their entirety. It's taken some time to do that, as a matter of fact, close to 20 minutes or so.

I don't find that the search made by Turner in the house was improper. I think he may have gone further, perhaps, than his intended objectives in making the search but, once properly in the house, I think the search he made was proper. That being the case, the police officers had proper custody of the safe in taking it away from the burglars and thieves. I think they had to take it down to the police station.

The next two questions, however, are more difficult. And I am going to decide them in favor of the District Attorney. These are my reasons: I believe that Counsel for the defense is correct in that there should be some expectation of privacy in the safe that is before this Court. And that expectation of privacy can only be overcome by some suspicion as to what the contents of the safe may be.

The Court has no way of knowing, really, because there have been no Colorado cases to this effect to what extent the suspicion should be to overcome the expectation of privacy. But I expect it is sufficient in this case when the information about the spoon and the drug paraphernalia in the cellar, as discovered by Turner and, also, the later discovery of the card on Mr. Unruh

to the effect that he was a dealer in drugs or had been known or thought to be, suspected to be a dealer in drugs, is sufficient to overcome the expectation of privacy.

With regard to the *Jackson* case, yes, the *Jackson* case is a very significant case but, as I pointed out to Counsel, the first-numbered paragraph, the Court outlines in six numbered sentences just exactly what the affidavit held in that case. It became increasingly apparent, as you read down through the numbered sentences, that the information that was suppose to be coming to the affiant began getting more and more obscure. That is to say, it was more and more difficult to ascertain who in fact told the affiant what he testified to or what he swore to in his affidavit.

When you get down to the sentences numbered four and five there is no way of knowing how the affiant—or who informed the affiant as to those matters set forth in those paragraphs.

But in this affidavit, we have—the only sentence—or, I should say, the only paragraph which at any time specifically set forth as to how Turner came by his information is the paragraph with regard to the dog. However, the affidavit does say, and I quote—and this is one, two, three, fourth—fifth paragraph—"On September 30, 1981 at twelve-thirty p.m., Detective Sanchez, Scanlan and Shell responded to the custodian's office"—and it tells what happened in the dog-sniffing incident.

The obvious common-sense inference from the *Ball* case must be either Scanlan, Shell or Sanchez informed Detective Turner. And that is a reasonable inference, a logical inference, and one inference in which this Court is going to indulge.

Therefore, the motion to suppress is denied.

MR. SPRINGER: Your Honor, our motion also deals with statements made by the defendants. There has been some testimony concerning those statements.

THE COURT: Yes. They should not be suppressed, either.

Gentlemen, I have some copies of cases here that I would like to keep, if I may.

MR. HECKENBACH: That's fine, your Honor.

THE COURT: This warrant and affidavit is presently loosely in the file jacket of this case. I would ask that one of you see to

it that it is firmly placed in the file jacket of this case so we don't lose it. And this, I believe, is yours, sir.

MR. HECKENBACH: I will take responsibility for that, your Honor.

THE COURT: All right, fine. We are in recess.

(Whereupon, the hearing was concluded.)

REPORTER'S CERTIFICATE

The above and foregoing is a true and complete transcription of my stenotype notes taken in my capacity as Official Reporter of Courtroom Eighteen of the District Court, Second Judicial District, State of Colorado, at the times and places above set forth.

Dated at Denver, Colorado this 27th day of September, 1982.

Carol Kerr
Certified Shorthand Reporter

CERTIFICATE

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

INASMUCH as the above and foregoing contains all of the evidence offered or introduced upon the trial of this case on the part of the Plaintiff and the Defendant, and all of the proceedings had and objections and motions interposed during the hearing thereon, and the rulings and orders of the Court made thereon, and inasmuch as the same do not appear of record elsewhere, the Defendant tenders this as his Reporter's Transcript, and prays the trial judge may approve, allow, sign, and seal the same, pursuant to the statute in such case made and provided, which when so approved, allowed, settled, signed and sealed may become part of the record herein.

I, the undersigned Judge, before whom said cause was heard, do hereby approve, allow, settle, sign, and seal the same as the Reporter's Transcript in said cause, do hereby certify the same is full, complete and correct, and contains all the evidence introduced or offered at the trial of said cause on behalf of the Plaintiff and the Defendant; and the same is made a part of the record herein.

Done at Denver, Colorado this 21st day of December, 1982.

John Brooks, Jr.
Judge

APPENDIX C

SUPREME COURT, STATE OF COLORADO
Case No. 84SA299
Appeal, District Court, City and County of Denver

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellee,
vs.
DARRELL UNRUH,
Defendant-Appellant.

Upon consideration of the Petitions for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petitions shall be, and the same hereby are, denied.

BY THE COURT, EN BANC, FEBRUARY 24, 1986.

JUSTICE ERICKSON and JUSTICE ROVIRA would grant Petition for Rehearing filed by Plaintiff-Appellee.

JUSTICE LOHR would grant Petition for Rehearing filed by Defendant-Appellant.

cc. Eric Perryman, Asst. A.G.
1525 Sherman Street
Denver, CO 80202

Jeffrey A. Springer, Esq.
Robert M. Brown, Esq.
1600 Broadway, Suite 2300
Denver, CO 80202

APPENDIX D

SUPREME COURT, STATE OF COLORADO
Case No. 84SA299

APPEAL FROM THE DISTRICT COURT
IN AND FOR THE CITY AND COUNTY OF DENVER
HONORABLE RAYMOND D. JONES, DISTRICT JUDGE

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellee,
v.
DARRELL UNRUH,
Defendant-Appellant.

PETITION FOR REHEARING
Opinion by Justice Dubofsky;
En banc

JEFFREY A. SPRINGER, P.C.
Jeffrey A. Springer, No. 6793
1600 Broadway, Suite 1500
Denver, Colorado 80202
(303) 861-2800
Attorney for Defendant-Appellant

SUPREME COURT, STATE OF COLORADO
Case No. 84SA299

PETITION FOR REHEARING

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellee,
vs.
DARRELL UNRUH,
Defendant-Appellant.

Pursuant to Rule 40, C.A.R., the Defendant-Appellant, Darrell Unruh, through counsel, Jeffrey A. Springer of the Law Firm of Jeffrey A. Springer, P.C., submits the following Petition for Rehearing with respect to this Court's decision announced January 21, 1986.

AS GROUNDS FOR REHEARING, the Defendant states as follows:

DISPENSING WITH THE WARRANT REQUIREMENT FOR NON-EXIGENT, NON-HUMAN SENSE SEARCHES, EVEN THOUGH SPECIFIC IN NATURE, IS DIRECTLY CONTRARY TO ALL PRECEDENT, INCLUDING TERRY V. OHIO, AND IS PATENTLY UNCONSTITUTIONAL.

Recognizing a defendant's reasonable expectation of privacy in a locked safe stored in his basement, this Court correctly held that the dog sniff in this case was a search. However, in determining that this non-exigent, non-human sense search, which albeit detects "in most cases only the presence of narcotics", does not demand probable cause nor prior judical approval, the Court has misapplied and misapprehended the methodology of *Terry v. Ohio*, 392 U.S. 1 (1968) and the scope of the constitutional protections against warrantless searches. With this holding, the Court has now wholly emasculated the constitutionally mandated privacy protections for "high tech" or non-human sense searches by falling prey to the "emerging tendency...to convert the Terry decision into a general statement that the Fourth Amendment requires only that any seizure be reasonable". *United States v. Place*, 462 U.S. 696, 721 (1983) (Justice Blackmun concurring.)

The reasonableness of a search, standing alone, has never been a sufficient basis to dispense with the warrant requirement. Instead, the "reasonableness" methodology becomes applicable only under exceptional and exigent circumstances of the type which forged the evolution of this *Terry* exception to the warrant requirement:

> "We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure...or that in most instances failure to comply with the warrant r quirement can only be excused by exigent circumstances...But we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat — which historically has not been, and as a practical matter could not be, subjected to the warrant procedure." *Terry v. Ohio,* 392 U.S. at 19.

Unlike the unusually dangerous, spur-of-the-moment confrontation in *Terry v. Ohio* or the non-government controlled chanelling of a suitcase through a public airport in *United States v. Place,* the safe in this case was securely in the custody and control of the law enforcement officers who had ample opportunity for continued and calculated investigation and, ultimately, for application for a judicial warrant. To justify a warrantless search under these circumstances upon a so-called *Terry* analysis is to ignore the condition precedent to engaging in a reasonableness analysis — the finding of exigent or highly unusual circumstances which do not allow further non-intrusive investigation. No court has ever taken the *Terry* analysis this far. In fact, the concept that mere reasonableness should suspend the warrant requirement has been flatly and squarely rejected by the United States Supreme Court in not only the criminal context but the civil administrative context as well. *See, Camara v. Municipal Court,* 387 U.S. 523 (1967).

In *United States v. Place, supra,* the Court stopped short of holding that a canine sniff *per se* was not a search. Instead, the Court ruled that under the particular facts of that case, exposure of luggage, which its owner had intentionally placed in the public domain of an airport, was not a search. The Court did not even suggest that a warrantless sniff of luggage *not* volun-

tarily exposed to the public would be exempt from Fourth Amendment protections, including the warrant requirement.

Instead, the United States Supreme Court has suggested that the result under that circumstance would likely be to the contrary. In *United States v. Karo*, 82 L.Ed2d 530 (1984), the Court flatly rejected the notion that, simply by utilizing a non-intrusive means (an electronic beeper) of determining the presence only of illicit drugs in an area not open or exposed to the public, law enforcement officers could avoid the warrant requirement. The Court's analysis in that case is particularly applicable to a dog sniff of a safe never intentionally exposed to the public:

> "The monitoring of an electronic device such as a beeper is, of course, less intrusive than a full-scale search, but it does reveal a critical fact about the interior of the premises that the government is extremely interested in knowing and that it could not have otherwise obtained without a warrant. The government's contention that warrantless beeper searches should be deemed reasonable is based upon its deprecation of the benefits and exaggeration of the difficulties associated with procurement of a warrant...Those suspected of drug offenses are no less entitled to that protection than those suspected of non-drug offenses." *United States v. Karo*, 82 L.Ed.2d at 541, 542, 543.

In this case, the dog sniff was no less intrusive than the beeper in *Karo*. Each disclosed *only* the presence of illicit drugs within the confines of an otherwise wholly private enclosure. Similarly the need to investigate and capture drug offenders is no greater here than that recognized in *Karo*. Yet even the additional fact in *Karo* that the drum of drugs was to be placed beyond the control of the government agents — in contradistinction to the continued control of the safe by law enforcement in this case — was not sufficient to allow dispensing with the warrant requirement. Hence, absent unusually exigent circumstances, *Karo* precludes the application of a general reasonableness standard as a basis for avoiding the constitutional requirement that a warrant be obtained even for what otherwise might be a limited, specific search which could only reveal the presence of illicit drugs.

In abolishing the warrant requirement for what this Court characterizes as a "uniquely selective" and minimally intrusive search, the Court has chartered a course into territory which will be explored by law enforcement officers without benefit of advance judicial approval. A non-exigent "view" into one's home with a device designed exclusively to detect the presence of illicit drugs or weapons or other contraband is now countenanced by this case and will occur without any prior judicial scrutiny. Simply stated, the Opinion in this case does away with the warrant requirement for *any* non-human sense, selective search even in the absence of exigent circumstances. Neither *Terry* nor any other precedent would allow for this wholesale abandonment of the warrant protections provided by the Colorado and United States Constitutions.

WHEREFORE, the Defendant respectfully requests that this Honorable Court grant him a rehearing and re-examine the issue of monumental importance raised above.

DATED THIS 11TH DAY OF FEBRUARY, 1986.
Respectfully submitted,
JEFFREY A. SPRINGER, P.C.
Jeffrey A. Springer, 6793
1600 Broadway, Suite 1500
Denver, CO 80202
(303) 861-2800

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing Petition for Rehearing was mailed, postage prepaid, this 11th day of February, 1986, addressed to the following:
Eric Perryman,
Assistant Attorney General
ATTORNEY GENERAL'S OFFICE
Appellate Section
1525 Sherman Street
Third Floor
Denver, CO 80203

APPENDIX E

DISTRICT COURT
CITY & COUNTY OF DENVER
STATE OF COLORADO

MOTION TO SUPRESS

Criminal Action No. 82CR0025
Courtroom 16

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff,

vs.

DARRELL UNRUH,
Defendant.

COMES NOW the Defendant, DARRELL UNRUH, by and through his attorney, A. RICHARD BERMAN, and hereby respectfully moves this Honorable Court to enter an Order suppressing the introduction into evidence at trial of any and all of the following items or occurrences:

A. Any and all items seized from the Defendant, his premises, automobile, safe, or other structure owned, under the control, or under the custody of said Defendant at any time including at the time of his detention and arrest.

B. Any information or mental observations gained as a result of any unlawful search, seizure, or arrest of the Defendant.

C. Any and all statements or confessions made by the Defendant.

AS GROUNDS THEREFORE, Defendant states as follows:

1. That no valid search warrant had been issued authorizing the search of the Defendant, his premises, his automobile, or any other structure owned or under his control.

2. That no valid arrest warrant had been issued authorizing the arrest of the Defendant.

3. That the search of the Defendant, his house, his premises, vehicle, safe, or any other structure under his control

or custody was not made upon probable cause.

4. That the arrest of the Defendant was not made upon probable cause.

5. That the arrest and search of the Defendant took place in violation of Defendant's Fourth and Fifth Amendment rights as guaranteed to him by the United States Constitution and his rights guaranteed to him under the Fourteenth Amendment to the United States Constitution and Article II, Section 7 of the Colorado State Constitution.

6. That any statements or confessions made by the Defendant were obtained in violation of his rights to due process of law as guaranteed by the United States and Colorado Constitutions.

WHEREFORE, the Defendant prays that his Motion to Suppress be granted upon the foregoing grounds, but not to the exclusion of any other grounds which may be presented at the time of the hearing.

DATED THIS 3RD DAY OF MARCH, 1982

Respectfully submitted,

A. RICHARD BERMAN 4300
Attorney for Defendant Darrell Unruh
1600 Broadway, Suite 2300
Denver, CO 80202
(303) 861-2800

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have served the foregoing Motion to Suppress by placing a true and correct copy thereof, in the United States mail, postage prepaid, this 5th day of March, 1982, addressed to:

Denver County District Attorney
924 West Colfax Avenue
Denver, CO 80204